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11
12 **IN THE UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14 **SOUTHERN DIVISION**

15
16 ECHOSTAR SATELLITE CORP.,
ECHOSTAR COMMUNICATIONS
17 CORP., ECHOSTAR TECHNOLOGIES
CORP., AND NAGRASTAR L.L.C.,

18 Plaintiffs,

19 v.

20 NDS GROUP PLC, NDS AMERICAS,
21 INC., JOHN NORRIS, REUVEN
HASAK, OLIVER KOMMERLING,
22 JOHN LUYANDO, PLAMEN DONEV,
VESSELINE NEDELTCHEV,
23 CHRISTOPHER TARNOVSKY, ALLEN
MENARD, LINDA WILSON, MERVIN
24 MAIN, DAVE DAWSON, SHAWN
QUINN, ANDRE SERGEL, TODD
25 DALE, STANLEY FROST, GEORGE
TARNOVSKY, BRIAN
26 SOMMERFIELD, ED BRUCE,
"BEAVIS," "JAZZERCZ,"
27 "STUNTGUY," and JOHN
DOES 1 - 100,

28 Defendants.

Case No. SA CV 03-950 DOC(ANX)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT CHRISTOPHER
TARNOVSKY'S MOTION TO
DISMISS PLAINTIFFS' THIRD
AMENDED COMPLAINT**

Date: December 13, 2004
Time: 8:30 a.m.
Dept: Judge David Carter
Courtroom 9D

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I. Introduction.

1
2 Plaintiffs' Third Amended Complaint ("TAC") includes a morass of legally
3 irrelevant details apparently designed to mask the absence of allegations essential
4 for plaintiffs' various claims. Many of those allegations are false and offensive
5 accusations about defendant Christopher Tarnovsky ("Tarnovsky"), who has spent
6 the last several years working with NDS on entirely legitimate anti-piracy activity.
7 Many other allegations relate to conduct allegedly committed by others using
8 pseudonyms that are wrongly attributed to Tarnovsky. The transparent purpose of
9 such tactics is to bully, intimidate and terrorize Tarnovsky. But this effort should
10 be short-lived because the TAC's allegations fail to state claims against Tarnovsky,
11 and the TAC—like its predecessors—should be dismissed.

12 Many of the claims should be dismissed because they are barred by the
13 statute of limitations. Counts 1-8, 11-15, 17-20 and 22 all purport to assert claims
14 having a two- or three-year statute of limitations. But the most recent factual
15 allegation in the TAC regarding conduct by Tarnovsky allegedly occurred in
16 December 2000, more than three years before this action was initiated against
17 Tarnovsky in February of 2004. All of these claims must therefore be dismissed.
18 Count 16, plaintiffs' claim under California Business & Professions Code § 17200
19 is also time-barred and should likewise be dismissed.

20 Plaintiffs' equally overreaching RICO claims (9 and 10) should also be
21 dismissed. This Court previously dismissed plaintiffs' RICO claim for failure to
22 allege a criminal "enterprise" as required by the statute. Despite numerous
23 allegations specific to these claims, plaintiffs still do not satisfy this essential pre-
24 requisite for a claim under section 1962(c) or the corollary conspiracy claim under
25 section 1962(d). None of the TAC's numerous allegations fulfills the elements for
26 violations of the statutes that plaintiffs identify as the basis for the alleged predicate
27 acts, and plaintiffs thus fail to allege the required pattern of racketeering activity.
28 Plaintiffs also fail to allege the necessary predicate acts for a RICO claim.

1 Plaintiffs' RICO claims should be dismissed for the additional reason that the TAC
2 does not allege facts demonstrating that Tarnovsky is a proper RICO "person"—
3 i.e., that he had "*some* part in directing the enterprise's affairs."

4 Many of the other claims should also be dismissed as to Christopher
5 Tarnovsky because the TAC simply does not allege that Tarnovsky committed
6 conduct that satisfies the elements of those claims. These include claims 1-8 and
7 11-18. And the claim for breach of contract (Count 21) should be dismissed
8 because it asserts the breach of a contract that had not even been executed by the
9 time of the alleged breach. Additionally, the alleged breach occurred outside the
10 four-year limitations period applicable to breach of contract claims. Thus, Count
11 21 is time-barred and should be dismissed for this independent reason.

12 The result of these myriad defects is that the entire TAC should be dismissed
13 with prejudice against Tarnovsky. This is plaintiffs' fourth opportunity to state a
14 viable claim for relief and further leave to amend would be futile. Four
15 opportunities are enough, and plaintiffs' claims should be dismissed without leave
16 to amend.

17 18 **II. Discussion.**

19 Many of the arguments that dictate dismissal of plaintiffs' claims against
20 Christopher Tarnovsky ("Tarnovsky") are identical to those that also require
21 dismissal of plaintiffs' claims against defendants NDS Group and NDS Americas
22 ("NDS"). To avoid unnecessarily burdening the Court with duplicative arguments,
23 Tarnovsky joins in NDS's concurrently filed motion to dismiss and supporting
24 arguments, as identified in the following discussion. Tarnovsky thus recommends
25 that the Court review NDS's motion to dismiss and supporting memorandum before
26 this one. Tarnovsky also specifically joins in NDS's concurrently filed motion to
27 strike. These arguments demonstrate that plaintiffs have failed to state tenable
28 claims against Tarnovsky, and he should therefore be dismissed from the case.

1 **A. Tarnovsky Joins in NDS' Argument that the TAC is "Grounded in**
2 **Fraud" And Its Allegations Must Be Pled "With Particularity."**

3 For the reasons discussed in NDS's memorandum, the TAC purports to
4 allege a "unified course of fraudulent conduct" and is therefore "grounded in fraud"
5 pursuant to controlling Ninth Circuit authority. See NDS Mem. 3:4-4:23.
6 Accordingly, the TAC's allegations must therefore be pled "with particularity" as
7 required by Rule 9. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir.
8 2003). Because numerous allegations of the TAC plainly fail to meet this standard,
9 they are properly stripped from the complaint. See *id.*

10 **B. Counts 1-8 and 11-22 of the TAC are Time-Barred and Should be**
11 **Dismissed.**

12 Tarnovsky specifically joins in NDS's arguments that the TAC fails to allege
13 any wrongful conduct within the limitations periods applicable to most of plaintiffs'
14 asserted claims. See NDS Mem. 4:24-9:26. As discussed in NDS's memorandum,
15 the TAC's conclusory and unsupported allegations that every named defendant is
16 still "actively engaged" in unspecified wrongdoing satisfy neither Rule 9 nor the
17 more liberal pleading standards of Rule 8 and therefore will not save plaintiffs'
18 time-barred claims. Because the TAC has not alleged conduct within the applicable
19 limitations period which would support Counts 1-8 and 11-22 of the TAC, these
20 claims should be dismissed.

21 Furthermore, because Tarnovsky was first named as a defendant in this case
22 when plaintiffs filed their SAC on February 18, 2004, that date governs the
23 computation of the statute of limitations. See *Kilkenny v. Arco Marine Inc.*, 800
24 F.2d 853, 858 (9th Cir. 1986). Under Fed. R. Civ. P. 15(c)(3), an amended
25 complaint that adds additional parties relates back to the original complaint only if,
26 within 120 days of filing the original complaint, "the party to be brought in by
27 amendment ... (b) knew or should have known that, but for a mistake concerning
28 the identity of the proper party, the action would have been brought against the

1 party.” Fed. R. Civ. P. 15(c). But Rule 15(c) “was never intended to assist a
2 plaintiff who ignores or fails to respond in a reasonable fashion to notice of a
3 potential party.” *Id.* at 857. Instead, “it was intended to protect a plaintiff who
4 mistakenly names a party and then discovers, after the relevant statute of limitations
5 has run, the identity of the proper party.” *Id.* at 858.

6 In this case, plaintiffs’ decision to name only NDS Group and NDS Americas
7 as defendants in both the original complaint and the FAC was not because of “a
8 mistake concerning the identity of the proper party.” In fact, the original complaint
9 contains numerous allegations describing Tarnovsky’s purported wrongdoing. *See*
10 Complaint ¶¶ 49, 55-59. “The mistake under Rule 15(c) has to be as to identity,
11 and there was no mistake as to the identity of [Tarnovsky].” *Louisiana-Pacific*
12 *Corp. v. Asarco, Inc.*, 5 F. 3d 431, 434 (9th Cir. 1993). Accordingly, because the
13 TAC does not relate back to the original complaint, February 18, 2004 is the proper
14 date for determining whether the claims against Tarnovsky were timely filed.

15 1. Plaintiffs’ claims with a two-year limitations period are time-barred.

16 Properly disregarding its unsupported allegations of continuing wrongdoing,
17 the TAC fails to plead any wrongful conduct by Tarnovsky within the 2-year
18 limitations period applicable to many of the TAC’s asserted claims—i.e., after
19 February 18, 2002. Accordingly, those claims having a two-year limitations
20 period—i.e., plaintiffs’ ECPA and common law claims (Counts 6, 17-20) are time-
21 barred and should be dismissed. In addition, in accordance with the FAC Order,
22 plaintiffs’ “claim” for joint-contribution (Count 22) also necessarily fails because
23 the other state law claims are time-barred. *See* FAC Order p. 8.

24 2. Those claims having a three-year limitations period are also barred.

25 Plaintiffs’ claims for relief having a three-year limitations period must be
26 based on conduct occurring after February 18, 2001. But all of Tarnovsky’s alleged
27 conduct, the alleged creation of the “reprogrammer” (*see* TAC ¶¶ 15, 18, 149-150),
28 and the “support” allegedly provided by Tarnovsky to Menard (*see* TAC ¶¶ 21,

1 178, 294), terminated with the December 23, 2000 internet post. Indeed, this
2 alleged post is the most recent *fact* alleged in the TAC about *any* defendant. Even
3 if these acts violated the statutory claims asserted by plaintiffs (they would not, had
4 they occurred), they allegedly occurred more than three years before plaintiffs filed
5 this action against Tarnovsky.

6 Having been repeatedly apprised that their claims are time-barred, plaintiffs
7 attempt to plead around their statutes of limitations defects. But the only “new”
8 allegation in the TAC about Tarnovsky is that “[u]pon information and belief,
9 discovery will reveal that Tarnovsky continued to provide assistance and/or
10 facilitation of the unlawful piracy of Plaintiffs’ DISH Network signal up through
11 and including June 25, 2003.” TAC ¶ 60. Of course, nowhere does the TAC allege
12 any facts to support the libelous allegation that Tarnovsky “assist[ed] and/or
13 facilitate[ed]” piracy. Not only is this allegation properly disregarded as being
14 unsupported by any alleged facts, it is also inconsistent with the allegations
15 throughout the TAC and the SAC that after the alleged December 2000 post,
16 “satellite pirates were able to break free from their dependence on NDS, Tarnovsky
17 and Menard, among others, for obtaining reprogrammed EchoStar Access Card.”
18 TAC ¶¶ 21, 178, 294. Plaintiffs’ generic allegation on “information and belief”
19 should be disregarded for this additional and independent reason. *Reddy v. Litton*
20 *Indus., Inc.*, 912 F.2d 291, 296-297 (9th Cir. 1990); *Salvioli v. Cont’l Ins. Co.*, 1996
21 WL 507297 at *4 (N.D. Cal.).

22 Because all of Tarnovsky’s alleged conduct occurred, even according to the
23 TAC, before February 18, 2001, plaintiffs’ claims for relief against Tarnovsky
24 having a three-year limitations period—i.e., Counts 1-5, 7-8, and 11-15 of the TAC
25 are time-barred and should be dismissed.

26 3. Plaintiffs’ § 17200 claim (Count 16) is also time-barred and should be
27 dismissed.

28 For the reasons given in NDS’s memorandum, plaintiffs’ § 17200 claim is

1 also untimely and should be dismissed. *See* NDS Mem. 9:9-26.

2 4. Plaintiffs' breach of contract claim (Count 21) is also untimely.

3 The TAC attempts to assert a claim for breach of contract (claim 21) against
4 Tarnovsky based on the speculative breach of a "Residential Subscriber
5 Agreement" that plaintiffs allege was executed by Tarnovsky in August 1999.
6 *See* TAC ¶¶ 385-396. But the alleged "reverse engineering" plaintiffs identify as a
7 breach of this agreement (*see* TAC ¶ 390), allegedly occurred no later than
8 "February 1998" (*see* TAC ¶¶ 48, 147). Thus, the breach alleged by plaintiffs
9 occurred (if at all) outside the four-year limitations period applicable to breach of
10 contract claims in California—i.e., before February 18, 2000. Accordingly,
11 plaintiffs' claim for breach of contract is also barred by the statute of limitations
12 and should be dismissed for at least this reason.

13 **C. Tarnovsky Is Not Vicariously Liable for the Alleged Wrongdoing of**
14 **Others.**

15 For the reasons discussed below as well as the reasons discussed in NDS's
16 memorandum, *see* NDS Mem. 10:1-15:9, the TAC does not satisfy the requirement
17 specifically identified by this Court to "*plead facts that would lead to the legal*
18 *conclusion that agency exists ...*" between Tarnovsky and any of the individual
19 defendants. Order dated July 21, 2004 ("Rule 12(e) Order"), p. 4 (emphasis added).
20 Accordingly, the theories of secondary liability plaintiffs purport to allege fail on
21 their face to impute secondary liability to Tarnovsky for the alleged wrongdoing of
22 other individual defendants.

23 1. Tarnovsky cannot be held liable for the acts of alleged "co-agents."

24 In a failed effort to impute liability to NDS and Tarnovsky for the alleged
25 wrongdoing of Menard and his alleged "distributors," the TAC makes the bald
26 allegation that NDS, through Tarnovsky, "conspired" with Menard. TAC, p. 38.
27 The TAC then makes the flatly contradictory allegation that Menard and his so-
28

1 called “distribution network” were also acting as agents for and under the control of
2 NDS. *See, e.g.*, TAC ¶¶ 16, 57, 70. But as discussed in NDS’s Motion to Dismiss,
3 plaintiffs have alleged no facts supporting their contention that Menard and his
4 alleged distribution network were under the control of and/or agents for NDS.
5 *See* NDS Mem. 10:25-12:9.

6 And even if plaintiffs’ contradictory and conclusory allegation were
7 sufficient to demonstrate that Menard was acting as NDS’s “agent,” Tarnovsky’s
8 status as an NDS employee does not mean that he can thereby be held liable for the
9 acts of alleged NDS “co-agents.” A principal may be held liable for the acts of an
10 agent undertaken within the scope of that agency. *See, e.g.*, Restatement (Second)
11 of Agency, § 261. But the converse is not true; liability does not flow from the
12 principal to the agent or from agent to agent. *See Hernandez v. Gates*, 100
13 F.Supp.2d 1209, 1218 n.13 (C.D. Cal. 2000) (“‘reverse’ respondeat superior
14 liability is not cognizable.”). Even if an agency relationship between Menard and
15 NDS were properly alleged in the TAC (it is not), Tarnovsky would not thereby be
16 liable for Menard’s or any other alleged NDS “agent’s” acts.

17 2. Plaintiffs’ conclusory and unsupported conspiracy allegations cannot
18 withstand a motion to dismiss.

19 The TAC alleges that sixteen of the individual defendants, including
20 employees of NDS, were “co-conspirators of NDS.” *See* TAC, pp. 37-38. But like
21 the TAC’s “agency” allegations, the TAC’s allegation that “Defendants were also
22 acting in concert with NDS as co-conspirators vis-à-vis the overriding NDS
23 conspiracy” is a legal conclusion that must be supported by sufficient factual
24 allegations. *See* Rule 12(e) Order, p. 4; *see also Sameena Inc. v. U.S. Air Force*,
25 147 F.3d 1148, 1152 (9th Cir. 1998) (dismissing complaint where conspiracy claim
26 was not pled with the requisite particularity). And to properly plead a conspiracy,
27 plaintiffs must allege facts that demonstrate “both an agreement to participate in an
28 unlawful act, and an injury caused by an unlawful overt act performed in

1 furtherance of the agreement.” *Alfus v. Pyramid Tech. Corp.*, 745 F.Supp. 1511,
2 1520 (N.D. Cal. 1990). Conclusory allegations of fraud or conspiracy are not
3 sufficient. *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

4 Plaintiffs’ improper attempt to allege that Tarnovsky “conspired” with his
5 employer NDS, *see, e.g.*, TAC, p. 38, can be summarily rejected. The law of this
6 Circuit is quite clear that a conspiracy cannot exist between NDS and Tarnovsky or
7 any other NDS employee. *See Accuimage Diagnostics Corp. v. Terarecon, Inc.*,
8 260 F.Supp.2d 941, 947 (N.D. Cal. 2003) (holding that a corporate entity cannot
9 conspire with its own employees). Therefore, plaintiffs must allege—at a
10 minimum—facts demonstrating that a conspiracy existed between Tarnovsky and at
11 least one non-NDS defendant. But nowhere does the TAC allege that Tarnovsky
12 and any other defendant (including Menard) had an agreement, either explicit or
13 tacit, to join the alleged “overriding NDS conspiracy” (TAC ¶¶ 17, 24, 35, etc.)
14 *See Alfus*, 745 F.Supp. at 1521.

15 Instead, the TAC alleges that “NDS, through, among others, Tarnovsky,
16 conspired with Menard to assist in NDS’s overall conspiracy.” TAC, p. 38. But
17 this conclusory allegation is insufficient. Plaintiffs do not allege what was agreed
18 to, when it was agreed to, or how it was agreed to. Nor does the TAC allege facts
19 demonstrating that Tarnovsky and Menard (or any other defendant) had a
20 conspiratorial agreement, whether explicit or tacit, to join the alleged conspiracy.
21 And “[i]t is not enough to show that defendants might have had a common goal
22 unless there is a factually specific allegation that they directed themselves towards
23 this wrongful goal by virtue of a mutual understanding or agreement.” *See Alfus*,
24 745 F.Supp. at 1521. Tarnovsky’s alleged conduct demonstrates, even if true, only
25 that Tarnovsky had a supplier/distributor relationship with Menard. But similar to
26 this Court’s rejection of this alleged relationship as a basis for imposing RICO
27 liability, this purported relationship is likewise insufficient to transform Tarnovsky
28 and Menard into “co-conspirators.” *See FAC Order*, p. 11 (noting that Tarnovsky

1 did not “control” the alleged RICO enterprise merely because he provided software
2 to Menard).

3 Lacking any alleged facts showing that Tarnovsky and Menard agreed to
4 participate in the alleged “overarching NDS conspiracy,” the conspiracy allegations
5 of the TAC cannot withstand a motion to dismiss. *See Sameena*, 147 F.3d at 1152
6 (affirming dismissal of conspiracy count where “appellants failed to allege facts to
7 support their allegations that the individual defendants agreed [to commit the
8 alleged torts].”); *Berry v. Baca*, 2002 WL 356763 at *3 (C.D. Cal.) (dismissing
9 conspiracy count where allegations failed to state: “(1) who agreed to engage in the
10 conspiracy; (2) what was agreed to; (3) when it was agreed to; or (4) how it was
11 agreed to.”).

12 Because the TAC lacks any timely allegations of direct wrongdoing by
13 Tarnovsky and because plaintiffs’ theories of secondary liability are wholly
14 insufficient to state a claim against Tarnovsky for the alleged acts of piracy by
15 others, Counts 1-8 and 11-22 of the TAC are time-barred and should be dismissed.

16 **D. Plaintiffs’ RICO Claims Should Be Dismissed as to Tarnovsky.**

17 For the reasons discussed below and in NDS’s accompanying memorandum,
18 plaintiffs’ RICO claims suffer from fatal pleading defects—including the defect
19 that led to dismissal in the Court’s FAC Order—and should be dismissed.

- 20 1. The TAC does not allege an actionable criminal “enterprise” or a
21 “pattern of racketeering activity” as required by § 1962(c).

22 Tarnovsky joins in NDS’s arguments that plaintiffs have not alleged an
23 actionable criminal “enterprise” because the TAC does not plead the requisite
24 higher structure controlling both the “distribution and sales” and “technology” sub-
25 structures. NDS Mem. 15:17-17:17. Tarnovsky also joins in NDS’s arguments that
26 plaintiffs’ have not alleged a “pattern of racketeering activity” because the alleged
27 predicate acts do not, as a matter of law, constitute a “pattern of racketeering
28 activity.” *See* NDS Mem. 17:18-20:16. Counts 9 and 10 of the TAC are thus

1 critically deficient for these reasons and should be dismissed.

2 2. Tarnovsky is not a proper RICO “person,” and plaintiffs’ RICO claims
3 should be dismissed for this additional and independent reason.

4 In addition to the defects noted in NDS’s Memorandum in support of its
5 Motion to Dismiss, plaintiffs’ RICO claim under § 1962(c) should be dismissed for
6 the additional reason that the TAC does not allege facts demonstrating that
7 Tarnovsky “conduct[ed] or participat[ed]” in the affairs of the alleged RICO
8 enterprise. 18 U.S.C. § 1962 (c). In *Reves v. Ernst & Young*, 507 U.S. 170 (1993),
9 the Supreme Court held that to be a RICO “person” liable under § 1962(c), the
10 RICO defendant must participate in the “*operation or management* of the
11 enterprise itself.” *Id.* at 183 (emphasis added). The Court stressed that “*some* part
12 in directing the enterprise’s affairs is required.” *Id.* at 179 (emphasis in original).
13 Even plaintiffs’ fanciful allegations do not suggest, however, that Tarnovsky took
14 any part in the “operation or management” in the alleged enterprise. Furthermore,
15 any such contention flatly contradicts plaintiffs’ allegations that Tarnovsky worked
16 “under the direction and control of NDS.” See TAC ¶¶ 54, 58, 59. Because the
17 entirety of Tarnovsky’s alleged conduct was, according to plaintiffs, “under the
18 control and direction of NDS,” Tarnovsky cannot be a RICO defendant for
19 purposes of § 1962(c). See *Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir. 1996)
20 (plaintiff’s allegations “demonstrate that the wrongful conduct of which the
21 [defendant] is accused relates not to his management of the alleged RICO
22 enterprise, but rather to his having been controlled by it.”). Plaintiffs’ claim under
23 § 1962(c) is properly dismissed for this additional independent reason.

24 The above defect in plaintiffs’ allegations is likewise fatal to plaintiffs’ claim
25 under § 1962(d). The Ninth Circuit requires that a RICO conspiracy claim under
26 § 1962(d) must also be supported by allegations that the defendant agreed to have
27 “some part in directing [the enterprise’s] affairs.” *Neibel v. Trans World Assurance*
28 *Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997) (quoting *Reves*, 507 U.S. at 179); see also

1 *Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). Because plaintiffs'
2 TAC includes no such allegation with respect to Tarnovsky, their RICO claim
3 under § 1962(d) should also be dismissed.

4 **E. Additional, Independent Reasons Support the Dismissal of Several**
5 **Claims Against Tarnovsky.**

6 1. Tarnovsky's alleged conduct does not support many of plaintiffs'
7 statutory claims.

8 As discussed above and in NDS's Motion to Dismiss, the TAC's conclusory
9 allegations are insufficient to state a claim under either Rule 8 or Rule 9, and fail to
10 state claims for actionable conduct within the applicable statute of limitations.
11 In addition, although his name is continuously invoked throughout the TAC, the
12 alleged *facts* concerning Tarnovsky's conduct are insufficient to support plaintiffs'
13 state law and statutory claims. Instead, Tarnovsky is included along with nineteen
14 others in the TAC's generic allegations that merely parrot the statutory language of
15 plaintiffs' asserted claims. But the TAC includes absolutely no supporting
16 allegations describing when, where, or how this supposedly wrongful conduct
17 occurred. *See, e.g.* TAC ¶¶ 224, 233, 242, 252, 261, 270, 276, 283, 305, 310, 319,
18 328, 336, 344, 354,, 361, 367. And as discussed in NDS's memorandum, the
19 TAC's allegations of "continuing" wrongdoing satisfy neither the particularity
20 demanded of a complaint "grounded in fraud," nor the more the liberal "notice"
21 pleading requirements of Rule 8. *See* NDS Mem. 5:13-7:27.

22 The only alleged *facts* concerning Tarnovsky's conduct are that (1) "in or
23 about 1999" Tarnovsky built a so-called "reprogrammer" device allegedly used by
24 defendant Al Menard to reprogram plaintiffs' access cards (*see, e.g.*, TAC ¶ 149,
25 294); (2) he allegedly "controlled" and supported Menard's alleged distribution
26 network until late 2000 (*see, e.g.*, TAC ¶ 294); and (3) in or before December 2000,
27 he transmitted information that plaintiffs contend was obtained by reverse
28 engineering plaintiffs' access cards (*see, e.g.*, TAC ¶ 21, 149 n.17, 294). Assuming
the truth of these allegations and ignoring the other substantive defects in plaintiffs'

1 claims, the TAC further fails to allege the requisite facts which would support many
2 of the asserted claims for relief.

3 Many of the TAC's claims require actual piracy of plaintiffs' signal or actual
4 counterfeiting of plaintiffs' access cards to incur liability. These claims include all
5 claims based on violations of the DMCA (Counts 1-3), the Communications Act
6 (Counts 4 and 5), the ECPA (Count 6), the Lanham Act (Counts 7-8), and
7 California Penal Code §§ 593d and 593e (Counts 11-15). These claims for relief
8 prohibit, for example, one from "circumventing" a technological protection
9 measure, "intercepting" an electronic communication, "manufacturing" or
10 "distributing" counterfeit access cards bearing plaintiffs' trademark, or making an
11 unauthorized connection to plaintiffs' satellite signal. *See, e.g.*, 17 U.S.C.
12 § 1201(a)(1)(A) (prohibiting *circumventing* a technological measure); 47 U.S.C.
13 § 605(a) (prohibiting *interception* of any radio communications); 18 U.S.C.
14 § 2511(1)(a) (prohibiting *interception* ... of wire, oral, or electronic
15 communications); California Penal Code §§ 593d(a), 593d(c) and 593e(a)
16 (prohibiting *making* or *maintaining* an unauthorized connection).

17 But the TAC does not allege facts that support the conclusion that Tarnovsky
18 violated any of these statutes. Because Plaintiffs do not allege any facts that would
19 support a conclusion that Tarnovsky actually circumvented any technological
20 measures, intercepted any protected communications, maintained any unauthorized
21 connections to plaintiffs' satellite signal, or distributed counterfeit access cards,
22 Counts 1-8 and 11-15 of the TAC should be dismissed.

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1 2. The Court should dismiss plaintiffs' speculative interference claims for
2 the reasons given in NDS's Motion to Dismiss.

3 Even if not barred by the two-year statute of limitations applicable to these
4 claims, as discussed in NDS's memorandum, plaintiffs' claims for interference with
5 contractual relations and prospective contractual relations/economic advantage
6 (claims 17 and 18) should be dismissed for failing to identify the alleged
7 relationships with the required particularity. *See* NDS Mem. 23:4-23:23.
8 Tarnovsky joins in these arguments and seeks dismissal of these claims for this
9 additional and independent reason.

10 3. Plaintiffs' breach of contract claim is based on a breach that allegedly
11 occurred *before* the contract was executed.

12 In addition to being time-barred (*see* Section B(4), *supra*), plaintiffs' claim
13 for breach of contract should be dismissed for the additional reason that that the
14 TAC alleges that Christopher Tarnovsky breached a contract before the contract
15 was even alleged to have been executed. According to the allegations of the TAC,
16 Tarnovsky executed a "Residential Subscriber Agreement" with plaintiffs in August
17 of 1999. *See* TAC ¶¶ 385-396. But even assuming the truth of plaintiffs'
18 allegations regarding the existence of a contract between plaintiffs and Tarnovsky,
19 the alleged "reverse engineering" plaintiffs identify as a breach of the Residential
20 Subscriber Agreement (*see* TAC ¶ 390), allegedly occurred in "February 1998"
21 (*see* TAC ¶¶ 48, 147). Assuming the truth of plaintiffs' allegations, the breach
22 alleged by plaintiffs occurred *before* Tarnovsky's alleged execution of the
23 Residential Subscriber Agreement. *See* TAC ¶ 387. Tarnovsky obviously could
24 not breach a contract he had not yet executed. Plaintiffs' claim for breach of
25 contract should be dismissed for this additional reason.

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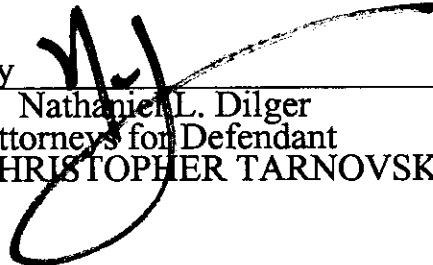
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III. Conclusion.

For at least the foregoing reasons, plaintiffs' TAC should be dismissed. And because plaintiffs have now had four opportunities to state a valid claim, the Court's dismissal should be with prejudice.

Dated: September 20, 2004

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